

programming. See A&E Comments at 14.

HBO asks the Commission to let the market dictate the need for captioning services on premium cable services. They claim that these services should be exempt from captioning requirements because they are "discretionary entertainment services." According to HBO, if they do not provide captioning and other enhancements required by consumers, consumers simply will not purchase their services. HBO Comments at 6. SBCA, asking for a similar exemption for premium cable services, also alleges that individuals make a selective decision to subscribe to a premium service for a fee, and requests the Commission to let market demands increase captioning by such services. SBCA Comments at 9.

Time and again, Congress and the Commission have recognized that market forces alone have been insufficient to ensure access to telecommunications services for individuals with disabilities.²¹ Indeed, the failure of cable providers to caption more of their programs reveals the inadequacy of such market forces.²² Moreover, as noted by HBO and the SBCA, for market forces to work, consumers need choices. Yet there are few

²¹ For example, in the Telecommunications for the Disabled Act of 1982, 47 U.S.C. §610, Congress decided to continue permitting cross-subsidization of specialized customer premises equipment through tariffs for local telephone rates because there was not a sufficiently competitive telecommunications market for such equipment. H. Rep. No. 97-888, 97th Cong., 2d Sess. 3 (1982).

²² NCTA also claims that over time, cable programmers will maximize access to their preexisting programs by voluntarily captioning the "popular previously produced programs that they intend to show on a regular basis." NCTA Comments at 22. Yet the vast majority of most pre-existing regularly scheduled programs - on Nickelodeon, for example - remain without captions.

choices for deaf and hard of hearing viewers when it comes to much of the programming available on premium cable stations. Movies shown in theaters are not at all accessible, only a mere percentage of home videos are captioned, and, to date, consumers have had to rely on the goodwill of premium stations to caption only a percentage of their programming.

Similarly, NCTA argues that the top 20 basic cable networks and the top 6 premium channels together caption nearly 24 percent of their programming (excluding 1-6 AM), which represents over 30,000 hours per year of programming. NCTA Comments at 4. When analyzed carefully, however, this figure is hardly representative of the captioning records of the overwhelming majority of basic cable networks. First, as noted in our initial comments, because premium cable stations and the CNN and USA channels have exceedingly higher captioning rates than do the other basic cable stations, inclusion of the captioning hours of these channels skews considerably the overall percentage of shows that are actually captioned. Second, NCTA itself notes that there are over 100 national cable television networks and more than 40 regional and local cable programming networks, which together represent thousands of hours of programming daily. NCTA Comments at 6. If this is the case, then 30,000 over an entire year certainly is a minuscule amount of captioning.

NCTA goes on to say that, weighted by available ratings, the amount of prime time cable programming approaches 40 percent. The NAD questions the validity of such a figure, in that NCTA

does not make clear the basis for which it has set forth this conclusion.²³ But of most concern is the NCTA statement which follows this statistical analysis: "[c]able subscribers as a result have access to a wide and ever-increasing array of captioned programming." NCTA Comments at 5. Even assuming cable programming were to reach a 40 percent captioning rate, it is difficult to comprehend how cable providers can expect caption viewers to be willing to accept less than the full range of its video services. We request such providers to simply imagine the outcry of complaints were they to suddenly tell their hearing subscribers that, in the future, they will only be able to receive audio information on 40 percent of their programs. Industry and regulators alike would consider it absurd to continue charging those consumers the full amount of their cable bills if they suddenly lost 60 percent of their access to cable stations. Perhaps with such an analysis, one can better understand the absurdity of requesting deaf and hard of hearing viewers to pay 100 percent of their cable charges when they are receiving access to at best an average of 8 percent of cable programming.

A. Kaleidoscope Channel

NCTA, in an effort to demonstrate that deaf and hard of hearing viewers do have access to cable shows, directs the Commission's attention to the Kaleidoscope cable channel. NCTA

²³ For example, NCTA does not reveal the channels which it incorporated into its analysis, the hours it considers prime time, nor what it means when it refers to "available ratings."

Comments at 5. But the Kaleidoscope Channel is a poor example of full access to cable programming. First, the Kaleidoscope Channel is limited in its availability and viewing times. Indeed, many cable providers decline to provide Kaleidoscope programming altogether. And even those cable providers that have selected Kaleidoscope for their cable stations offer only limited coverage of its available programs. For example, Cable TV Montgomery only airs the Kaleidoscope Channel at 11:30 p.m. on the community cable channel.

Second, the programming on Kaleidoscope is geared to issues concerning individuals with disabilities; it does not provide the mainstream programming available on other cable channels. While providing some very valuable programming, Kaleidoscope cannot offer itself as a substitute for full access to cable programming.

IX. Application of the Undue Burden Exemption Should be Consistent with the Americans with Disabilities Act

The Act permits providers of video programming and program owners to petition the Commission for individual captioning exemptions if they can prove that providing captioning would result in an undue burden. 47 U.S.C. §713(d)(3). In reaching an undue burden determination, the Commission is directed to balance the nature and cost of providing captions with the overall financial resources and type of operation of the provider or owner. This test, which allows for exemptions only where there is evidence of a "significant difficulty or expense," *id.*, is

patterned after the undue burden language of the Americans with Disabilities Act (ADA). Audience or market share, the local or regional nature of the production, and the cost of individual productions vis-a-vis captioning costs are not permissible factors for these individual determinations.²⁴

The Americans with Disabilities Act is intended to reverse decades of persistent discrimination against individuals with disabilities. Similarly, the captioning provisions of the Telecommunications Act are intended to reverse decades of exclusion from the television medium for individuals who are deaf and hard of hearing. The overriding goal of both statutes is to ensure basic access where such access has previously been denied.

Having been patterned after the ADA, it is appropriate to turn to the ADA's application of the undue burden standard to understand the scope of permissible undue burden exemptions under the Telecommunications Act. Under the ADA, the Department of Justice has permitted undue burden exemptions where the entity covered - for example a theater, a bank, or local university - can adequately show that providing a particular accommodation for an individual disability would so adversely affect the finances or administration of that entity's operations as to be unduly

²⁴ Arts and Entertainment, for example, requests that the Commission exempt "networks that fail to achieve a specified audience reach threshold, on an annualized basis." A&E Comments at 19. Regardless of whether A&E is seeking an exemption under Section 713(d)(1) or under Section 713(d)(3), we believe that consideration of audience share is inappropriate, for the reasons set forth below.

burdensome. Whether or not that entity has a large or small clientele - analogous to the large or small audiences in the video programming industry - is irrelevant to its obligation to make its services accessible.

An example will help to illustrate this point. Consider the situation where there are several universities in one small city. Suppose some of these universities have thousands of students, while one - "Apple University" - has only a few hundred students. The obligation to provide accessible services is the same for each of these universities and does not diminish with the size of Apple University's "audience." Indeed, Apple University may have significant endowments, while these other universities may be struggling financially. In that case, the obligations to provide access may be even greater for Apple, as the other schools might be in a position to prove that providing certain services would result in an undue burden.²⁵

Similarly, the ADA does not balance the cost of providing an accommodation with the budget for a particular service in determining undue burden. Again an example will help to demonstrate this point. Under Title III of the ADA, physicians

²⁵ Another problem with considering audience share - for exemptions under either Section 713(d)(1) or Section 713(d)(3) - is that it does not take into account the fact that caption viewers want consistent access to captions when they travel throughout the country. Exemptions based on audience shares would require viewers to settle for varying degrees of access, depending on the audience share of particular programs in the communities to which they travel.

are required to provide sign language interpreters where necessary to achieve effective communication with deaf patients. 28 C.F.R. §§36.104; 36.303(b)(1). At times, the cost of providing such an interpreter may be more than the cost of actually providing that medical service. In this situation, the ADA requires an examination of the physician's overall resources, not the cost or fee for that particular service in determining whether the physician is excused from providing interpreting services under the undue burden clause. Although a particular service may be inexpensive, the physician's overall resources may be quite substantial, in which case he or she will still be obligated to provide interpreting services.

By analogy, the particular production budget of or revenues derived from a particular program may not be substantial, but the overall revenues of the provider, producer, or owner may be more than adequate to handle captioning costs. Consider, for example, ABC's complaint that the advertising revenues and viewership attributable to a single regionalized sporting event do not warrant the costs of captioning. ABC Comments at 6. Although the advertising revenues for a particular game may be lower than revenues collected for national events, we assert that it would be difficult for ABC to argue that its overall resources could not withstand the costs of captioning those regionalized events.²⁶ This principle applies to all entities covered under

²⁶ Actually, we have serious doubts that even the advertising revenues of these regional events- when compared with the costs of captioning these programs - would be low enough to warrant a

the Act: although the budget for a particular program may be small, the overall profit revenues of a station may be more than sufficient to cover captioning costs without incurring an undue burden.²⁷

Finally, the fact that a program may only be shown once also cannot be a consideration for a finding of undue burden under the Act. NCTA argues, for example, that because the costs of certain live programs - i.e. sporting events, newscasts, and courtroom activities - cannot be recouped through subsequent airings, it may be "uneconomic" to caption such programming. See NCTA Comments at 11. This argument bears little merit and flies in the face of the overall intent of the Act to provide full access to all new video programming.

X. Live Encoded Captions Should be Preserved in Archives

CBS notes that often live encoded captioning is used where there is insufficient time to create captions in advance for pre-recorded programs, such as late night talk shows (where there are only a few hours between taping and broadcast). CBS Comments at 11-12. Live encoded captions are real-time captions added to a pre-recorded program at the time of airing. CBS explains that

finding of undue burden.

²⁷ Moreover, it is difficult to determine what would be included in a calculation of a program's budget or expected revenues. As the League for Hard of Hearing points out, the profit for a particular program may turn out to be far greater than was originally anticipated when the program was budgeted for its initial broadcast. For example, additional profits may result from a second line of purchases through home videos. LHH Comments at 4.

although these captions are typically used for programs that are not likely to be rebroadcast, it has a policy of requiring captioning agencies to maintain these captions in archives so that they do not need to be re-created if indeed such programs are re-aired. In order to avoid unnecessary duplication, we urge the Commission to codify this policy into law. In addition to rebroadcasts on television (e.g. prime time specials of "The Best of" late night talk shows), distribution of pre-existing video programming through the world wide web and other electronic mediums will likely proliferate in the future. As programming becomes available through these alternative mediums, deaf and hard of hearing individuals should have the benefit of utilizing the captions that were added to these shows.

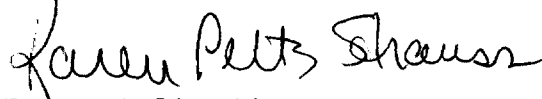
XI. Conclusion

The wait for full access to video programming has been far too long for deaf and hard of hearing viewers. Notwithstanding the unequivocal mandate in the Telecommunications Act of 1996 to put an end to this discriminatory trend, various parties now come before the Commission in an effort to perpetuate this era of exclusion. We urge the Commission to reject these exemption requests and to heed the directive of Congress to achieve comprehensive and full access to video programming.

The NAD applauds the historic step that the Commission has taken in its Notice of Inquiry on captioning and video description, and looks forward to working with the Commission to

ensure full and quality access to video programming for all
Americans.

Respectfully submitted,

A handwritten signature in cursive script that reads "Karen Peltz Strauss".

Karen Peltz Strauss
Legal Counsel for Telecommunications Policy
National Association of the Deaf
814 Thayer Avenue
Silver Spring, MD 20910-4500

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